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No. 81-2365

IN THE

Supreme Court of the United States

October Term, 1981

PHILIP FITZPATRICK,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Petitioner Philip Fitzpatrick seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered April 23, 1982. By that judgment, the Court of Appeals, in an unreported decision, unanimously affirmed a judgment entered September 16,

1981, in the United States District Court for the Southern District of New York (the Honorable Lawrence W. Pierce, D. J.), denying Fitzpatrick's application for a writ of habeas corpus. By that application, Fitzpatrick had sought to have the District Court set aside a judgment rendered June 22, 1979, in New York Supreme Court, New York County (the Honorable David Edwards, J.), sentencing Fitzpatrick to three years' probation after his conviction at a jury trial of four counts of Perjury in the Third Degree (New York Penal Law §210.05).

Statement of the Case

The State Proceedings

In June 1976, two major narcotics traffickers, Joseph Carl Gallo and Ronald Sofia, were indicted by a New York City Special Narcotics Grand Jury for, *inter alia*, selling $32,000 worth of heroin to an undercover police officer. The top count in the indictment was a class A-I felony, which carried a minimum sentence of fifteen years to life imprisonment. However, defendants charged with a class A-I felony could be permitted to plead guilty to a class A-II felony, for which the lowest possible sentence was six years to life, or to a class A-III felony, for which a defendant could receive a minimum of one year to life. In September 1976, the People offered to allow Gallo to plead guilty to a class A-II felony, with the understanding that he would receive a sentence of seven years to life imprisonment (Heffernan: A. 249-50, 260-70*).

* Parenthetical references preceded by "A." are to the trial minutes, reproduced in petitioner's three-volume appendix submitted to the Appellate Division. That appendix was before the Court of Appeals and will be forwarded to this Court upon request.

On October 14, 1976, petitioner Philip Fitzpatrick appeared at the Staten Island home of **Charles Heffernan**, the assistant district attorney prosecuting the Gallo-Sofia case, to intercede for Gallo. Fitzpatrick told Heffernan that he was appearing as the intermediary for Father **William Wood**, a Jesuit priest. Fitzpatrick told Heffernan that he had a longstanding relationship with Father Wood and that he and Father Wood had done favors for one another in the past. According to Fitzpatrick, Father Wood was a friend of the Gallo family, had been working with the Gallo "boy" and believed that Gallo was "salvageable." Fitzpatrick also told Heffernan that Father Wood intended to ask **Paul Curran**, a former assistant United States attorney for the Southern District of New York, to intercede with Sterling Johnson, the New York City Special Narcotics Prosecutor, on Gallo's behalf (Heffernan: A. 279-82, 285-91; Ct. Exh.: 1-7).

Throughout his conversation with Heffernan, Fitzpatrick emphasized that he himself was not involved in Gallo's case and that he was appearing solely on behalf of Father Wood. Fitzpatrick asked Heffernan whether, in light of Father Wood's opinion that Gallo was "salvageable," Gallo could be permitted to plead to a class A-III felony. Heffernan refused. Unknown to Fitzpatrick, his entire conversation with Heffernan was tape-recorded* (Heffernan: A. 283-85, 288-89; Ct. Exh.: 8, 10, 12, 15, 17, 18, 21-24, 27).

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* The tape recording of Fitzpatrick's conversation with Heffernan was admitted into evidence and played for the jury (A. 298, 315; Peo. Exh. 3). A copy of the transcript distributed to the jury was marked as a Court Exhibit (A. 314-15). Copies of both exhibits will be supplied to this Court upon request.

Contrary to Fitzpatrick's representations to Heffernan, Fitzpatrick had no longstanding relationship with Father Wood, and Father Wood had never met the Gallo family. In fact, Fitzpatrick had met Father Wood for the first time on October 11, 1976, three days before Fitzpatrick's visit to Heffernan. On that day, Fitzpatrick solicited Father Wood's assistance for a "boy" in trouble in a narcotics case. Father Wood assumed Fitzpatrick was the boy's attorney and agreed to meet the boy and his mother. On October 15, 1976, the day after Fitzpatrick's visit to Heffernan, Fitzpatrick arranged a meeting between Father Wood, Joseph Gallo and Gallo's mother. This meeting was Father Wood's first and only contact with Gallo (Wood: A. 487, 492-503, 545-46).

On October 19, 1976, Fitzpatrick arranged a second meeting involving himself, Father Wood and Paul Curran. Fitzpatrick was present for the whole of this twenty-five-minute meeting, which took place at Curran's office (Wood: A. 506-10, 513, 516, 594-95; Curran: 628-31, 633-40, 654-55, 664).

In May 1977, the Special Narcotics Grand Jury began to investigate possible conspiracy, attempted bribery, obstruction of governmental administration and other crimes in connection with the Gallo prosecution, and specifically whether there had been a conspiracy to influence unlawfully the outcome of the case. The purpose of the investigation was to determine what had been done on Gallo's behalf and who had done it. In July and October 1977, Fitzpatrick testified before the Grand Jury four times. The Grand Jury wanted to know why Fitzpatrick had misrepresented his relationship to Father Wood and who was really the

moving force behind Fitzpatrick's attempts to intercede with Assistant District Attorney Heffernan and Paul Curran. Fitzpatrick testified under a grant of transactional immunity, as required by New York Criminal Procedure Law Section 190.40(2) (Rudnydsky: A. 141-42, 148-52; Rode: A. 182-89; A. 736; Grand Jury Minutes of July 19, 1977: 3-7; Grand Jury Minutes of July 22, 1977: 19-20).

Fitzpatrick persisted in maintaining, before the Grand Jury, that Father Wood had solicited his assistance on behalf of Gallo. Fitzpatrick now testified, however, that he had no longstanding relationship with Father Wood, and that he had approached Heffernan only as a favor to another old friend of his named Sidney Bergman, who was also a friend of Father Wood (Grand Jury Minutes of July 19, 1977: 8-13, 23; Grand Jury Minutes of July 22, 1977: 7-8, 12-13, 16-17, 20, 29-31, 35; Grand Jury Minutes of July 29, 1977: 8, 21, 26; Grand Jury Minutes of October 7, 1977: 14-15; A. 789, 792). For his part, Father Wood denied asking Fitzpatrick to help Gallo. According to Father Wood, it was Fitzpatrick who approached the priest and asked him to intervene in Gallo's case (Grand Jury Minutes of May 23, 1977: 7-12, 17-19, 26; Grand Jury Minutes of July 8, 1977: 9-10, 14-19, 25, 33-38).

In thus accounting for his approach to Heffernan, Fitzpatrick told the Grand Jury four specific lies. First, Fitzpatrick denied telling Heffernan that he had a longstanding relationship with Father Wood. Second, Fitzpatrick asserted that he had told Heffernan that the priest was a friend of a friend. Third, Fitzpatrick testified that he had told the assistant that it was Father Wood and another person, not himself, who had dealt with each other in the

past. Fourth, Fitzpatrick testified that he was present for only the introductory stage of the meeting with Paul Curran (A. 780-96). All of these statements were false. The recording of Fitzpatrick's conversation with Heffernan was not played for Fitzpatrick during his Grand Jury appearances (A. 56).

On October 18, 1977, Fitzpatrick was indicted on four counts of Perjury in the Third Degree. Fitzpatrick moved to dismiss the indictment, arguing, among other things, that his interrogation before the Grand Jury amounted to a "perjury trap." The motion was denied by the Honorable Michael J. Dontzin on December 4, 1978 (A. 14-18, 75-79A). Fitzpatrick proceeded to trial before Justice Edwards and a jury. At trial, Fitzpatrick did not deny that the four statements underlying the indictment were false, but he contended that his falsehoods arose from faulty memory rather than deliberate misrepresentation (A. 1197-1203, 1208-16, 1221, 1228-29, 1234-36, 1240-41, 1248-48A). On April 19, 1979, Fitzpatrick was found guilty on all four counts.

Fitzpatrick's conviction was unanimously affirmed, without opinion, by the Appellate Division of the New York Supreme Court. 76 A.D.2d 757 (1st Dept. 1980). Leave to appeal to the New York Court of Appeals was denied by the Honorable Bernard S. Meyer, Associate Judge of that court. 51 N.Y.2d 730 (1980).

The Federal Proceedings

On October 9, 1980, Fitzpatrick filed his petition for a writ of habeas corpus. Fitzpatrick urged that his intent

to lie had not been proven beyond a reasonable doubt, that his questioning before the Grand Jury amounted to a perjury trap and thus violated due process, and that the prosecutor's summation had deprived him of a fair trial. The petition was referred to Magistrate Ruth V. Washington, who submitted a Report and Recommendation recommending that it be denied. On September 9, 1981, then District Judge Lawrence W. Pierce adopted the magistrate's Report and Recommendation and denied the petition. On December 30, 1981, the judge granted a certificate of probable cause.

On appeal, Fitzpatrick advanced the same three claims he raised in the District Court. In response, the People contended, for the first time, that Fitzpatrick had not exhausted his state remedies with respect to his perjury trap claim, so that the petition must be dismissed under the rule of *Rose* v. *Lundy*, —— U.S. ——, 102 S. Ct. 1198 (1982).

The Court of Appeals unanimously affirmed the denial of the writ. The majority, Judges Meskill and Moore, assumed, but did not decide, that Fitzpatrick had exhausted his state remedies with respect to his perjury trap claim. These two judges found Fitzpatrick's perjury trap claim "troublesome." In their view, the prosecutor's procedure in the Grand Jury was inconsistent with the People's claim that the Grand Jury questioning was intended to elicit Fitzpatrick's motive for lying to Heffernan. Since the prosecutor did not disclose to Fitzpatrick that his conversation with Heffernan had been recorded, he did not ask Fitzpatrick why he had lied to Heffernan. "Thus," the majority found, "the prosecutor wholly failed even seriously to attempt to acquire the information he now claims he was

seeking." Were this a federal prosecution, the majority declared, they would be inclined to vacate the conviction because of the prosecutor's "questionable conduct." Nevertheless, the majority found the prosecutor's conduct did not amount to a deprivation of due process.

In a separate statement, Judge Lumbard concurred in affirming the denial of the writ but dissented from the majority's criticism of the state prosecutor. Judge Lumbard noted that none of the seven New York judges who had passed on the case had commented on the alleged impropriety. In Judge Lumbard's view, so long as the prosecutor's conduct did not amount to a violation of due process, there was no reason for the federal court "to instruct the state prosecutor on how he should conduct his office" (App., pp. 2a-4a*).

Fitzpatrick seeks certiorari to review two claims: (A) that the trial evidence was insufficient to permit a finding that his false statements to the Grand Jury arose from deliberate misrepresentation, as opposed to innocent lapses of memory and (B) that his questioning before the Grand Jury amounted to a "perjury trap" and denied him his federal constitutional right to due process of law.

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* Parenthetical references preceded by "App." are to the Appendix to the Petition for Writ of Certiorari.

ARGUMENT

Reasons for Denying the Writ

1. Fitzpatrick claims, first, that the trial evidence was insufficient to permit a finding that his false statements to the Grand Jury arose from deliberate misrepresentation as opposed to an innocent failure to recall the events about which he testified. The jury rejected that claim, obviously believing that when Fitzpatrick testified nine and twelve months after his visit to Heffernan, he must have remembered lying to Heffernan about Father Wood, particularly since the prosecutor provided ample cues to stimulate Fitzpatrick's recollection and since Fitzpatrick's statements about Father Wood had been so obviously false. Similarly, the jury found that Fitzpatrick must have remembered the meeting with Paul Curran, a meeting arranged by Fitzpatrick himself for the purpose of persuading a former assistant United States attorney to intercede with the Special Narcotics Prosecutor on behalf of a defendant charged with a major felony.

In rejecting Fitzpatrick's claim that the evidence was insufficient to establish that he intentionally lied, the Court of Appeals recognized the controlling principle of law, that a conviction violates due process unless " 'a rational trier of fact could have found proof of guilt beyond a reasonable doubt.' *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979)" (App., p. 2a). Fitzpatrick does not question this principle or cite any conflict or ambiguity in its judicial interpretations; his only claim is that the principle was applied incorrectly in this case. But this claim, even if it had some

validity, would be inadequate basis for granting certiorari. It would not serve the purposes of the writ for this Court to canvass the record once again and weigh the evidence to determine whether the events about which Fitzpatrick testified were memorable, so that the jury could rationally find that he had deliberately misrepresented those events. *Ross* v. *Moffitt*, 417 U.S. 600, 616-17 (opinion of the Court), 620n. (Douglas, J., dissenting) (1974).

2. Fitzpatrick's second claim is that his questioning before the Grand Jury amounted to a "perjury trap" and denied him his federal constitutional right to due process of law. For the reasons set forth below, this claim does not deserve review on the merits. Initially, however, a procedural barrier should prevent this Court from reviewing Fitzpatrick's perjury trap claim: Fitzpatrick has either failed to exhaust his state remedies with respect to the claim, or has forfeited it by failing to raise it in his New York appeal.

Fitzpatrick did not contend in his state appeal that his grand jury questioning was improper as a matter of federal constitutional law. On the contrary, in his briefs to the Appellate Division, Fitzpatrick relied solely on New York cases, in particular the leading case of *People* v. *Tyler*, 46 N.Y.2d 251 (1978), to support his perjury trap claim.* To be sure, in setting forth the "Questions Presented" at the beginning of his main brief to the Appellate Division, Fitzpatrick claimed that the alleged misuse of the

* *See* Fitzpatrick's briefs to the Appellate Division (Appellant's Brief, pp. 2, 21-25; Appellant's Reply Brief, pp. 2-5) and his application for leave to appeal to the Court of Appeals (Letter to Judge Meyer, June 20, 1980). These materials will be supplied to this Court upon request.

Grand Jury "depriv[ed] defendant of due process of law" (Appellant's Brief, p. 2). But Fitzpatrick's mere use of the words "due process," when coupled with an argument based expressly on state law, did not sufficiently alert the Appellate Division to the federal nature of his claim.

In other words, Fitzpatrick did not give the New York courts a fair opportunity to consider "the same claim" as the claim presented in his petition for a writ of habeas corpus. *Picard* v. *Connor*, 404 U.S. 270, 275-76 (1971). Fitzpatrick may still present that claim to the New York courts, if he can justify his failure to do so earlier. New York Criminal Procedure Law §440.10(1)(a), (2)(c). Should the New York courts find no justification for Fitzpatrick's failure to raise his federal claim on appeal and for that reason refuse to consider it, that finding would bar this Court as well from reviewing the claim. In short, Fitzpatrick has either failed to exhaust or forfeited his perjury trap claim; in either event, this Court may not reach the claim. *Rose* v. *Lundy*, —— U.S. ——, 102 S. Ct. 1198, 1199, 1205 (1982); *Engle* v. *Isaac*, —— U.S. ——, 102 S. Ct. 1558, 1570-75 (1982).

3. However, even apart from these procedural impediments, Fitzpatrick's perjury trap claim does not deserve review on the merits.

Initially, the Court of Appeals' finding that the prosecutor's questioning of Fitzpatrick did not violate due process in no way conflicts with other decisions reviewing claimed abuses of the Grand Jury. To support his claim, Fitzpatrick cites five federal cases dealing with the direct review of federal perjury convictions, but none of Fitz-

patrick's cases is relevant to the facts presented here. Three of these cases, *Brown* v. *United States*, 245 F.2d 549, 555 (8th Cir. 1957); *United States* v. *Cross*, 170 F.Supp. 303, 310 (D.C.D.C. 1959); and *United States* v. *Icardi*, 140 F.Supp. 383, 388-89 (D.C.D.C. 1956), concern situations in which a federal grand jury or legislative committee investigated crimes wholly unrelated to their jurisdiction and, in the course of that extralegal investigation, elicited perjurious testimony. A fourth case cited by petitioner explains in a footnote that there is federal case law "voiding convictions for perjury . . . where the investigative body was acting outside its lawful authority." *United States* v. *Mandujano*, 425 U.S. 564, 582 n.8 (1976). But there is no dispute in this case that the New York Grand Jury was acting within its lawful authority, investigating possible corrupt efforts to influence a New York narcotics prosecution, and these four cases are accordingly all irrelevant. In Fitzpatrick's fifth case, a federal Grand Jury questioned a witness about an event for which the witness, unknown to himself, had already been indicted. *United States* v. *Doss*, 545 F.2d 548, 552 (6th Cir. 1977). This case too is patently inapposite.

Not only is there no relevant conflict or ambiguity in the pertinent case law, but the particular violation Fitzpatrick alleges is illusory. Fitzpatrick argues that the prosecution offended constitutional standards of fairness by questioning him about "non-material" topics of inquiry (Petition, p. 15). This argument assumes that it violates due process to require a witness to testify before the Grand Jury and then ask him questions immaterial to the Grand Jury's investigation. Whatever the correctness of this assumption, that issue is not presented here.

In federal law, a false statement is material if it has "a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation." *United States* v. *Berardi*, 629 F.2d 723, 728 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980); *see also United States* v. *Byrnes*, 644 F.2d 107, 111 (2nd Cir. 1981); *United States* v. *Doulin*, 538 F.2d 466, 470 (2nd Cir.), *cert. denied*, 429 U.S. 895 (1976); *United States* v. *Lee*, 509 F.2d 645, 646 (2nd Cir.), *cert. denied*, 422 U.S. 1044 (1975); *United States* v. *Cohn*, 452 F.2d 881, 883 (2nd Cir. 1971), *cert. denied*, 405 U.S. 975 (1972). Fitzpatrick's falsehoods certainly met this standard. The questions put to Fitzpatrick concerning his statements to Heffernan about Father Wood, and his presence at Father Wood's discussion with Paul Curran, were central to the Grand Jury's effort to discover whether there was a conspiracy unlawfully to influence the Gallo prosecution. Fitzpatrick's false answers to these questions, and his deceitful claim that Father Wood had sent him to Heffernan, blocked the Grand Jury from asking Fitzpatrick who really had sent him to Heffernan, and thus diverted the Grand Jury from the object of their investigation. Even assuming a doubt whether Fitzpatrick's statements were material, it would not serve the purposes of certiorari for this Court to review the Grand Jury proceedings so as to resolve that issue.

Finally, Fitzpatrick complains that it was unfair to question him without playing the tape of his conversation with Heffernan (Petition, pp. 15-17). But nothing in the Due Process clause requires that a prosecutor must disclose to a Grand Jury witness any evidence in the prosecutor's possession which shows that the witness is lying. There is

no conflict in case law to be resolved with respect to this point; and indeed, courts have affirmed perjury convictions in which a witness's memory was not refreshed with a tape recording. *See, e.g., United States* v. *Carson,* 464 F.2d 424 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972); *People* v. *Pomerantz,* 46 N.Y.2d 240 (1978); *see also United States* v. *D'Auria,* 672 F.2d 1085, 1093 (2d Cir. 1982); *United States* v. *Del Toro,* 513 F.2d 656, 664 (2d Cir.), *cert. denied,* 423 U.S. 826 (1975). Fitzpatrick's claim reduces to the contention that his memory was not fairly stimulated, so that it was not clear he intentionally lied. As argued in response to Fitzpatrick's claim that the evidence was insufficient (*see* pages 9-10 above), it would be inappropriate for this Court to parse the record to determine this claim. In any event, as a matter of common sense, there is no reason to provide witnesses who lie to the Grand Jury with the opportunity to escape the consequences of their conduct by requiring that they be given a chance to tailor their testimony to what is known.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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